

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ROBERT ROE,

Defendant-Appellant.

UNPUBLISHED

March 14, 2006

No. 255635

Calhoun Circuit Court

LC No. 03-003966-FC

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct with a person under the age of 13, MCL 750.520b(1)(a), and was sentenced to concurrent terms of 35 to 60 years in prison for each count. Defendant appeals his sentence as of right. We affirm.

Defendant was convicted of anally, vaginally, and orally penetrating his stepdaughter over a period of several years. During the time of the assaults, the victim was between the ages of four and nine years old, and defendant was in his early to mid-thirties. Both the judicial and legislative guidelines were scored for the crimes because of the time frame involved. The judicial guidelines apply to crimes committed before January 1, 1999, and the legislative guidelines apply to crimes committed after January 1, 1999. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Under the judicial sentencing guidelines, defendant was assessed an offense score of 135 points, yielding an offense severity level IV and a guideline sentence range of 120 to 300 months (10 to 25 years). Under the legislative sentencing guidelines, defendant was assessed a prior record variable score of 20 points for a PRV level C and an offense variable score of 195 points for an OV level VI, yielding a minimum sentencing guideline range of 135 to 225 months (11.25 to 18.75 years). The trial court engaged in an upward departure and sentenced defendant to concurrent terms of 35 to 60 years in prison.

Under the judicial sentencing guidelines, the trial court was not obligated to impose a sentence within the recommended guidelines range; the judicial sentencing guidelines “were ‘mandatory’ only in the sense that the sentencing court was obliged to follow the procedure of ‘scoring’ a case on the basis of the circumstances of the offense and the offender, and articulate the basis for any departure from the recommended sentence range yielded by this scoring.” *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). That is, the sentence imposed by the trial court must satisfy the “principle of proportionality”—it must be proportionate to the

seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Under the legislative sentencing guidelines, we must first determine whether the trial court's sentence was within the appropriate guidelines range. *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). If the trial court's sentence was not within the appropriate guidelines range, we must determine whether the trial court articulated a substantial and compelling reason for departing from that range. *Id.* We must then determine whether these substantial and compelling reasons, if they exist, justified the sentence that the trial court imposed. *People v Reincke (On Remand)*, 261 Mich App 264, 266; 680 NW2d 923 (2004). Whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for an abuse of discretion, which occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes. *Babcock*, *supra* at 265, 269, 273-274.

At sentencing, the trial court articulated the reasons for its upward departure:

Well, [defendant], I also have had a chance to review your presentence investigation report. I did preside over your trial. I acknowledge you've not been in trouble before. But here are the things that struck me—I thought long and hard about this—first, it is the age of [the victim]. And I said earlier in response to [the prosecutor] a two, three year old child really would not understand what was being done to her. But where you have a child that is almost into puberty and a child who has some understanding of bodily functions and sexual acts, it's different and a child of ten or eleven is far more capable of being able to experience and understand the emotional and psychological devastation that results from these kind of acts. It is far greater than a three year old child would be.

Next, as the prosecutor has alluded to it was a number of times. We have a two or three year period here and [defense counsel] is correct, the physician from the University of Michigan Children's Hospital has only practiced five years, but she has examined hundreds of children and the damage done to [the victim] was more severe vaginally than any other child she has ever seen. The anal damage—you know the doctor covered this—really is not as objectively manifestable. And the oral penetrations obviously would not result in anything. But we had vaginal, anal, oral, and in addition there was the masturbation that [the victim] testified to.

These incidents occurred in the home, in the car. There were literally so many as prosecutor pointed out that [the victim] could not count. Beyond that she would be taken to a place of security; to wit, a bedroom and the door locked and at times [defendant] would say to her[], [“]you've been a bad girl[”] and [defendant] would blindfold her. Or [defendant] would fold the sheet over her eyes so she could not see, after that then [defendant] would penetrate her. [Defendant] threatened her, told her not to tell. All of these things, [defendant], are in the record. They are objective. They are verifiable.

In my view, [defendant], based upon the facts in this case the guidelines do not adequately reflect what was done to this little girl. [Defendant is] 39 years old. [The victim is] 11. Were it not for the guidelines my sentence would be far different, but I acknowledge the Legislature and our Supreme Court has put in place these guidelines, and I do respect them and I do pay attention to them, but in this case based upon the number of penetrations, the way in which they occurred, the length of time, the age of [the victim] and [defendant's] predatory behavior in taking her separate and apart justify [defendant's] removal from society. I think other children need to be protected from [defendant] also. [The victim's] 11. I want her to have some semblance of ordinary adulthood without fear of contact with [defendant].

On the departure evaluation form, the trial court indicated “[p]rotection of society and the victim—extreme violence of repeated assaults not covered by the guidelines” as the aspects of the case leading to the imposition of a sentence outside the recommended range.

Defendant argues that the trial court’s articulated reasons for the upward departure were insufficient to justify the sentences imposed. Specifically, defendant takes issue with the trial court’s consideration of the predatory nature of the assaults; the number of penetrations; the violent nature of the assaults; the span of time over which the assaults occurred; the victim’s age; and the age difference between the victim and defendant.

Defendant argues that a number of factors the trial court considered were already taken into account when calculating the sentencing guidelines. Specifically, defendant argues that the predatory nature of the assaults was already considered under OV 10, for which he was scored 15 points; the number of penetrations was already considered under OV 11, for which he was scored 50 points; and the span of time over which the assaults occurred was already considered under OV 13, for which he was scored 50 points. MCL 769.34(3)(b) provides that “[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.”

Here, the trial court determined that certain offense and offender characteristics had been given inadequate weight in determining the appropriate sentence range. OV 10 concerns exploitation of a vulnerable victim, and 15 points are to be assessed where predatory conduct, or preoffense conduct directed at a victim for the primary purpose of victimization, was involved. MCL 777.40(1)(a); MCL 777.40(3)(a). We agree with defendant that the nature of the assaults is not objective and verifiable, i.e., actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). However, the record reveals that the trial court focused on the nature of the assaults in the context of defendant’s predatory conduct, noting that they occurred in the home and in the car, and that the victim would be locked in a place of security, such as a bedroom, where she would be blindfolded and told that she had been a “bad girl.” Defendant would then threaten the victim and warn her not to tell anyone about the assaults. The trial court’s determination that defendant’s predatory conduct, more extensive and repeated than was necessary for the scoring of OV 10, constituted a

substantial and compelling reason to justify an upward departure did not constitute an abuse of discretion.

OV 11 concerns criminal sexual penetration, and 50 points are to be assessed where two or more criminal sexual penetrations occurred. MCL 777.41(1)(a). OV 13 concerns a continuing pattern of criminal behavior, and 50 points are to be assessed where the offense was part of a pattern of felonious criminal activity involving three or more sexual penetrations against a person less than 13 years of age. MCL 777.43(1)(a). The trial court focused on the fact that the assaults occurred numerous times over a period of several years. Defendant argues that the number of criminal sexual penetrations was not objective and verifiable. However, the victim testified that defendant anally penetrated her between 75 and 100 times, and vaginally penetrated her between 50 and 75 times. Further, the doctor who examined the victim testified that generally, only five percent of sexually abused girls show signs of being penetrated. However, the doctor testified that she had examined hundreds of other children and had never seen a child with so much scarring and had never seen an exam as abnormal as the victim's. The doctor testified that usually in a penetrating trauma, the hymen, if injured, has healed by the time of examination, unless the examination is performed in close proximity to the trauma. Here, however, the victim had no hymen: in its place was thick, whitened scar tissue evidencing penetrating trauma and consistent with repeated vaginal penetration. The trial court properly determined that the number of penetrations as well as the violent nature of the repeated assaults constituted objective and verifiable factors where they were physically evidenced and capable of being confirmed by the complete destruction of the victim's hymen. See *Abramski*, *supra* at 74. The number and violent nature of criminal sexual penetrations and the continuing pattern of criminal behavior shown here far exceeded that necessary for the scoring of OV 11 and 13. The trial court's determination that they constituted substantial and compelling reasons to justify an upward departure did not constitute an abuse of discretion.

Defendant next argues that while the victim's age and the age difference between himself and the victim were objective and verifiable, they did not constitute substantial and compelling reasons to justify an upward departure. We note, however, that it is apparent from the record that the trial court did not use the age difference as a reason to justify departure, but merely commented on it in reference to the victim's age. A substantial and compelling reason must keenly or irresistibly grab our attention and must be of considerable worth in deciding the length of a sentence. *Babcock*, *supra* at 272. The trial court focused on the age of the victim in the sense that as opposed to an infant or an adolescent who had reached puberty, the victim here was just old enough to have a limited understanding of the nature of the sexual assaults perpetrated on her, resulting in more severe emotional and psychological damage. The trial court's determination that the victim's sensitive age constituted a substantial and compelling reason to justify an upward departure did not constitute an abuse of discretion.

The trial court's articulated reasons in support of the upward departure from both the judicial and legislative sentencing guidelines justified the particular departure in this case; that is, it was proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Babcock*, *supra* at 273; *Milbourn*, *supra* at 636. Moreover, the sentence imposed fell within the range of reasonable and principled outcomes. *Babcock*, *supra* at 269, 274.

Defendant also argues that he is entitled to resentencing pursuant to the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d

403 (2004). Our Supreme Court and this Court have concluded that *Blakely* does not apply to sentences imposed in Michigan. *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005), citing *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004) and *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd in part 472 Mich 881; 693 NW2d 823 (2005).

We affirm.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Karen M. Fort Hood